BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAWN ANGELINA ROOT	)	
Claimant	)	
	)	
VS.	)	
	)	
THE ARNOLD GROUP	)	
Respondent	)	Docket No. 1,011,407
	)	
AND	)	
	)	
LIBERTY MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the June 30, 2005 Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on November 18, 2005.

APPEARANCES

Randy S. Stalcup of Wichita, Kansas, appeared for the claimant. Janell Jenkins Foster of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that, if the claimant is entitled to a work disability, the Administrative Law Judge's (ALJ) finding that claimant's work disability is 34 percent is not disputed.

ISSUES

The claimant suffered accidental injury as a result of a slip and fall at work on December 9, 2002. The parties disagreed regarding the nature and extent of claimant's disability caused by the accident.

Respondent argued that claimant was limited to her functional impairment because she was terminated for repeated violation of respondent's policy which required that she call in to work an hour before her shift started to report if she was going to be absent or

late. Conversely, claimant argued that her absences were the result of her work-related injury as demonstrated by the fact that she did not have any attendance problems at work until after her work-related accidental injury.

In analyzing the claimant's permanent disability, the ALJ found that claimant's termination was related to her work injury and awarded claimant a 34 percent work disability based upon a 21.5 percent task loss and a 47 percent wage loss.

The sole issue raised on review by the respondent is the nature and extent of claimant's disability. Respondent argues the claimant would have continued to earn a wage comparable to her pre-accident wage had she not been terminated for cause unrelated to her work injury. Consequently, respondent further argues claimant failed to make a good faith effort to retain accommodated employment and her award should be limited to her functional impairment.

Conversely, claimant argues she is entitled to receive a work disability (a permanent partial general disability greater than the functional impairment rating) because her termination was directly related to and caused by her work-related accidental injury. Accordingly, claimant requests the Board to affirm the ALJ's Award.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability. Specifically, whether the claimant demonstrated a good faith effort to retain accommodated employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The respondent is a human resource company that provides temporary staffing, permanent placement and training. Claimant was placed in a job with another employer, Rubbermaid, but the claimant received her paycheck from respondent.

The claimant began working at Rubbermaid on September 16, 2002, from 6 p.m. to 6 a.m. On December 9, 2002, the claimant was getting a part out of the molding injection machine when she slipped on a piece of cardboard and fell striking her right hand, hip and side. Claimant injured her lower back, hips and right hand. Her middle and ring finger were fractured. Respondent referred the claimant for medical treatment.

After her accidental injury, Rubbermaid could not accommodate the claimant's restrictions and respondent placed the claimant with a different employer in a light-duty job on December 23, 2002. The claimant was placed as a volunteer in a clerical position with the Main Street Program in Winfield, Kansas, but respondent continued to pay claimant's

salary. As she worked at this accommodated job she continued to receive medical treatment including ongoing physical therapy.

Because claimant had a work-related injury and had been provided restrictions her supervision shifted to Madonna Buresh, respondent's human resources consultant and loss control specialist. Ms. Buresh had supervisory authority and was responsible for providing oversight while claimant was limited to light duty jobs.

It is respondent's policy that an employee must notify respondent at least one hour before the start of the scheduled shift if the employee is going to be late or absent from work. Ms. Buresh noted that this policy was not being followed by claimant after she was placed in the light-duty job. Claimant was terminated by Ms. Buresh on January 23, 2003, due to abusing the attendance policy by not timely calling in to report that she was going to be late to work.

The Kansas appellate courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[1] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[2]

In *Foulk*[3], the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability by refusing an accommodated job that paid a comparable wage. Employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.[4] In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine[5] or not within the worker's medical restrictions.[6]

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[1] *See, e.g., Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[2] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1988).

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Niesz v. Bill's Dollar Stores*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[5] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[6] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

The respondent detailed the number of times that claimant allegedly violated the policy to call in an hour before her shift as required. However, examination of those specific dates does not entirely support respondent's position.

Initially, it should be noted that claimant's pre-injury work shift was 6 p.m. to 6 a.m. After her injury her light-duty job was 8 a.m. to 5 p.m. This change caused claimant to have problems arranging for care for her small children. And she was still receiving treatment which initially included problems with the medication she had been prescribed for her work-related injury. Moreover, claimant had complained that she was having back and hand problems which she felt was caused by her light-duty job.

Turning to the dates respondent relies on to support its position that claimant repeatedly failed to call in as prescribed by respondent's policy, it is first noted that claimant failed to call in or report to work on January 6, 2003 through January 9, 2003. But as previously noted, claimant had experienced an allergic reaction to the medications prescribed for her work-related injury. When claimant had called in on January 3, 2003, Ms. Buresh had directed claimant to return to the doctor which she did on January 6, 2003. On January 9, 2003, Ms. Buresh discovered claimant had not returned to the light-duty job so she contacted claimant who explained that after her doctor's appointment she did not understand that she was to return to work. Claimant was told that she was required to continue going to the light-duty job as her restrictions would be accommodated.

These four absences were clearly the result of claimant receiving medical treatment for her work-related injury and her misunderstanding that she was to continue with the light-duty job. This episode does not amount to a lack of good faith on claimant's part. And it is troublesome that claimant's report that her light-duty job was causing her difficulties does not appear to have received any serious response by respondent.

The next incident occurred on January 13, 2003. Claimant called in and reported that she had physical therapy but would be in afterwards. Claimant never went to work that day. There was no explanation why she never made it in to work that day but she did call in the next three days indicating that she was sick. On the third day Ms. Buresh contacted claimant and warned her that she was required to call in an hour before the start of the shift if she was going to be late or absent from work.

The following day, January 17, 2003, the claimant called in to report that after her physical therapy session she would be late to work. When claimant reported to work she told Ms. Buresh that she was having problems with her cast. Ms. Buresh requested claimant provide a list detailing when she had physical therapy appointments and agreed claimant would not need to call in on those dates. That list indicated claimant had scheduled physical therapy appointments Tuesday, Wednesday and Friday of the following week.

On Monday, claimant called in to report that she had a doctor's appointment to check her cast. A new cast was placed on her arm that day. The following two days

claimant worked. Then on Thursday, January 23, 2003, claimant called in at 8:30 a.m. and stated she was at physical therapy but had mistakenly gone there on the wrong day. She further reported that she would be at work in a few minutes. The claimant explained:

> Q. Would you explain the circumstances surrounding the separation of that employment, please?
>
> A. I had gone to physical therapy on the inappropriate day and called and said, "This is Dawn, I'm at physical therapy, I'm not supposed to be here, I will be at the office in 10 minutes." I was told okay. I had spoken to Crystal Samms, I believe. I went in to the office and then a couple of hours later got a call saying that I was terminated due to no-call/no-show.[7]

Claimant then went to work. A few hours later Ms. Buresh called and told claimant that she was being terminated for violation of the attendance policy.

While the failure to report to work after physical therapy on January 13, 2003, is troublesome it may well be related to claimant's illness which she reported the next three days. On January 16, 2003, when claimant called in she was told she needed to call in an hour before her shift. After that there were no problems until January 23, 2003 when claimant mistakenly went to physical therapy on the wrong day.

It was agreed that on the days when claimant had scheduled physical therapy there was no need to call in. Accordingly, on the day she went to physical therapy on the wrong day she did not call in until she realized that she had mistakenly reported for physical therapy. Claimant then called, albeit late, and reported for work. The Board concludes this mistake by claimant does not demonstrate a lack of good faith on her part.

Moreover, respondent's policy provided:

> An associate of TAG [respondent] incurring one (1) incident of unauthorized absence or lateness in any twelve-month period will receive a verbal warning from the TAG Staffing Specialist. **Should an associate be absent or late without authorization on a second (2nd) occasion in any twelve-month period, the associate will receive a written warning detailing the absence or lateness.** Any additional occurrence of unauthorized absenteeism or lateness will result in further disciplinary action up to and including immediate termination.[8] (Emphasis added)

Ms. Buresh agreed that upon a second violation of the policy an employee is to receive a written notification. Ms. Buresh further agreed that claimant was not provided

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[7] R.H. Trans. at 21.

[8] Buresh Depo., Ex. 5.

such written notification detailing the absence or lateness. The failure to follow its own procedures regarding the attendance policy does not demonstrate good faith on the part of respondent.

In summation, the claimant had never had any problems with absences or tardiness until after her work-related injury. After she was placed in a light-duty job she missed work on numerous occasions but some were related to her reaction to the medications she was prescribed as a result of her work-related injury and subsequent doctor's appointment. There was a misunderstanding that lead to failure to call in as required but that did not demonstrate a lack of good faith. Nor did the claimant's subsequent failures demonstrate a lack of good faith when viewed in the light that respondent failed to follow its own policy regarding progressive discipline including a written warning.

Accordingly, claimant is entitled to a work disability analysis and, as noted, the parties do not dispute the ALJ's finding claimant suffered a 34 percent work disability.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated June 30, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director